

1 **DUANE MORRIS LLP**
2 D. Stuart Bartow (CA SBN 233107)
3 dsbartow@duanemorris.com
4 Nicole E. Grigg (CA SBN 307733)
5 negrigg@duanemorris.com
6 2475 Hanover Street
7 Palo Alto, CA 94304-1194
8 Telephone: 650.847.4150
9 Facsimile: 650.847.4151

10 **DUANE MORRIS LLP**
11 Joseph A. Powers (PA SBN 84590)
12 Admitted *Pro Hac Vice*
13 japowers@duanemorris.com
14 Jarrad M. Gunther (PA SBN 207038)
15 Admitted *Pro Hac Vice*
16 jmgunther@duanemorris.com
17 30 South 17th Street
18 Philadelphia, PA 19103
19 Telephone: 215.979.1000
20 Facsimile: 215.979.1020

21 Attorneys for Defendant
22 SONICWALL INC.

23 **DUANE MORRIS LLP**
24 Matthew C. Gaudet (GA SBN 287789)
25 Admitted *Pro Hac Vice*
26 mcgaudet@duanemorris.com
27 John R. Gibson (GA SBN 454507)
28 Admitted *Pro Hac Vice*
29 jrgibson@duanemorris.com
30 Robin L. McGrath (GA SBN 493115)
31 Admitted *Pro Hac Vice*
32 rlmcgrath@duanemorris.com
33 David C. Dotson (GA SBN 138040)
34 Admitted *Pro Hac Vice*
35 dcdotson@duanemorris.com
36 Jennifer H. Forte (GA SBN 940650)
37 Admitted *Pro Hac Vice*
38 jhforte@duanemorris.com
39 1075 Peachtree NE, Suite 2000
40 Atlanta, GA 30309
41 Telephone: 404.253.6900
42 Facsimile: 404.253.6901

43
44 **UNITED STATES DISTRICT COURT**
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46 **NORTHERN DISTRICT OF CALIFORNIA**
47
48 **SAN JOSE DIVISION**

49 FINJAN, LLC, a Delaware Limited Liability
50 Company,

51 Plaintiff,

52 v.

53 SONICWALL INC., a Delaware Corporation,

54 Defendant.

55 Case No.: 5:17-cv-04467-BLF-VKD

56
57 **SONICWALL INC.'S RESPONSE TO**
58 **FINJAN'S MOTION IN LIMINE NO. 4 TO**
59 **PRECLUDE EVIDENCE OR TESTIMONY**
60 **REGARDING MR. TOUBOUL'S**
61 **REPLACEMENT AS CEO OF FINJAN**

62 Date: March 18, 2021
63 Time: 1:30 PM
64 Courtroom: 3, 5th Floor
65 Judge: Hon. Beth Labson Freeman

66
67 **REDACTED**
68
69

TABLE OF REFERENCED EXHIBITS¹

Excerpts from August 6, 2019 Deposition Transcript of Shlomo Touboul, <i>Finjan, Inc. v. Cisco Sys., Inc.</i> , Case No. 17-cv-72-BLF (N.D. Cal)	Ex. 40
August 1, 2005 Email from Asher Polani regarding Termination Letters, marked as Polani Deposition Ex. 13	Ex. 46
October 8, 2005 Email from Asher Polani regarding Finjan Transition Status – Snap Shot (October 8 th 2005), marked as Polani Deposition Ex. 14	Ex. 47
January 1, 2012 Consulting Agreement entered into between FI Delaware, Inc. and Shlomo Touboul, marked as Touboul Deposition Ex. 31	Ex. 48
April 11, 2006 Email from Asher Polani regarding Yahoo! Finance Story – Aladdin Granted Important U.S. Patent for Proactive Protection Against Spyware and Viruses, marked as Polani Deposition Ex. 4	Ex. 49
Excerpts from August 5, 2019 Deposition Transcript of Asher Polani, <i>Finjan, Inc. v. Cisco Sys., Inc.</i> , Case No. 17-cv-72-BLF (N.D. Cal)	Ex. 50
Frequently Asked Questions for Sales, marked as Polani Deposition Ex. 7	Ex. 51
Excerpts from January 8, 2018 Trial Transcript, <i>Finjan, Inc. v. Blue Coat Systems, Inc.</i> , Case No. CV-15-03295-BLF (N.D. Cal)	Ex. 52
Excerpts from October 31, 2017 Trial Transcript, <i>Finjan, Inc. v. Blue Coat Systems, Inc.</i> , Case No. CV-15-03295-BLF (N.D. Cal)	Ex. 53
Excerpts from the February 25, 2019 Deposition of Philip Hartstein, , <i>Finjan, Inc. v. Cisco Sys., Inc.</i> , Case No. 17-cv-72-BLF (N.D. Cal)	Ex. 54

¹ All exhibits are attached to the Declaration of Jarrad M. Gunther.

1 Finjan's Motion *in Limine* ("MIL") No. 4 seeks to allow Finjan to tell a one-sided version of
 2 its history. Finjan's effort should be rejected for multiple reasons.

3 **A. Finjan Cannot Cherry-Pick The Facts Of Its Corporate History**

4 As this Court has seen multiple times, Finjan's story to juries is that Finjan's founder – Shlomo
 5 Touboul – was a "visionary" and a genius, that he invented behavioral-based security, that Finjan
 6 thus invested \$70 million in research and development to bring its patented technology to market,
 7 that the only marketplace obstacle Finjan could not overcome was the financial crisis of 2008, and
 8 that Mr. Touboul remains a key technical consultant to the company and is the origin of the
 9 company's current mobile app (called InvinciBull).

10 That story is highly misleading. Evidence uncovered since those first few Finjan trials before
 11 this Court shows that [REDACTED]
 12 [REDACTED] to
 13 testify in line with the image Finjan would like to project to juries.

14 Specifically, Mr. Touboul now admits that [REDACTED]
 15 [REDACTED].” Ex. 40, at 176:6-176:9).
 16 Finjan's next CEO (Asher Polani) then alerted the Board that “Shlomo will, for any reason, sue the
 17 company . . .” and that “his attitude caused and is causing damages to the company on a continues
 18 [sic] basis” Ex. 46. Two months later, Mr. Polani told the Board that Kenyon & Co. (then
 19 Finjan's outside counsel) advised that Finjan should reconcile with Mr. Touboul because [REDACTED]
 20 [REDACTED]
 21 [REDACTED]” Ex. 47. (emphasis in original). Following that
 22 realization, Finjan [REDACTED]
 23 [REDACTED]. Ex. 40 at
 24 259:17-24. [REDACTED]. Ex. 48 at Section 2.1
 25 and Annex A. In other words, the actual evidence shows that much of Finjan's story about its own
 26 history and about Mr. Touboul is a paid-for, made-for-litigation narrative. This goes to the heart of
 27 credibility.

1 It would be fundamentally unfair to allow Finjan to tell any part of its story but preclude
 2 SonicWall from presenting the other side. Finjan attempts to shield itself from these bad facts by
 3 arguing that Mr. Touboul's replacement as CEO of Finjan "has no bearing on whether SonicWall
 4 infringes Finjan's asserted patents, the validity of Finjan's patents, or the amount of damages
 5 SonicWall owes Finjan for its willful infringement of the asserted patents." Dkt. 367 at 1. But the
 6 same can be said of the story that Finjan wishes to present to the jury. In other words, the fact that
 7 Finjan is anything other than the named plaintiff has no bearing on any of these issues. Yet, Finjan
 8 surely intends to tell the jury all about Finjan (the company) and its version of its corporate history,
 9 as it has done in every prior trial.

10 **B. Even Apart From Finjan's Story, Mr. Touboul's Replacement is Highly
 11 Relevant**

12 In addition to the fundamental fairness point above, there are two additional, stand-alone
 13 issues for which these facts are already relevant, regardless of what Finjan tells the jury about its
 14 history.

15 First, Mr. Touboul's replacement – Asher Polani – made a series of statements in his capacity
 16 as CEO about the fact that Finjan's technology and patents [REDACTED]
 17 [REDACTED]. This is a crucial point, because the key product that Finjan
 18 accuses on every remaining patent is SonicWall's sandbox, called "Capture ATP." Mr. Touboul's
 19 replacement – Mr. Polani – told the world that [REDACTED]
 20 [REDACTED]

- 21 • In an April 2006 email to the Board [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]

25 Ex. 49. Mr. Polani went on
 26 to explain that a gateway sandboxing solution (i.e., exactly what Finjan accuses in this
 27 case) [REDACTED] "Id."

28 Mr. Polani confirmed the accuracy of these statements at his deposition. Ex. 50 at 42:7-

1 44:24.

- 2 • Likewise, under Mr. Polani's leadership, Finjan released a public document stating that
 3 "We are not sandboxing the code, we do static analysis. What our 21 granted patents and
 4 26 other pending patents do is understand what the code intends to do on your browser,
 5 e.g., if it is downloading something to your computer or writing to your disk." Ex. 51.
 6 Again, Mr. Polani testified about this document. Ex. 50 at 54:16-58:13.

7 If Mr. Polani's statements as CEO are true, then SonicWall's sandbox cannot possibly infringe
 8 Finjan's patents. Especially in a case where Finjan is alleging willfulness – *i.e.*, that SonicWall must
 9 know that its sandbox infringes Finjan's patents – these irreconcilable statements from the CEO who
 10 replaced Mr. Touboul are highly relevant. Finjan's effort to make Mr. Polani disappear – and to
 11 replace him only by its paid litigation consultant (Mr. Touboul) – should be rejected.

12 Second, the facts relating to Mr. Polani are relevant to the credibility of Finjan's current CEO,
 13 Mr. Hartstein. For example, Mr. Hartstein testified under oath before multiple juries that the 2005
 14 agreement between Finjan and Microsoft was "transformational," and set the groundwork for the
 15 credibility of Finjan's license program. Ex. 52 at 243:19-244:14 ("[B]eing able to strike a license
 16 agreement with Microsoft . . . was really transformational for our business."); Ex. 53 at 372:13-373:10
 17 ("[T]he ability to have the industry recognize Finjan's technology was really transformative.").
 18 Based on the evidence, Mr. Hartstein appears to have made this up. Mr. Touboul [REDACTED]
 19 [REDACTED]. Ex. 50 at 129:18-24. Mr. Polani (again, the replacement
 20 CEO who Finjan wants to erase from its history and who was CEO during what would have been the
 21 "transformation") testified that [REDACTED] *Id.*, at
 22 78:2-16. Mr. Hartstein would not have known that, however, because despite Mr. Hartstein's
 23 willingness to offer sworn testimony about events for which he has no first-hand knowledge, he has
 24 never even spoke with Mr. Polani. Ex. 54 at 126:16-23.

25 **C. No Unfair Prejudice**

26 Finjan has not articulated any specific example of unfair prejudice, nor cited any cases that
 27 reach a result analogous to what Finjan seeks here. In sum, the reason Finjan will reference Mr.
 28

1 Touboul is to glorify the story of its founding and create a sense of credibility about itself. There is
2 nothing unfairly prejudicial about telling the rest of the story, nor is there anything unfair about
3 rebutting Finjan's willful infringement allegations with the public statements of its former CEO (Mr.
4 Polani) that its patents do not cover sandboxing.

5 Finjan has not identified any distinct form of unfair prejudice in its motion. Finjan simply
6 does not like the picture that emerges when all of the evidence is presented to the jury.

7
8 Dated: March 11, 2021

Respectfully Submitted,

9
10 /s/ Nicole E. Grigg
11 Nicole E. Grigg (formerly Johnson)
12 Email: NEGrigg@duanemorris.com
13 **DUANE MORRIS LLP**
14 2475 Hanover Street
15 Palo Alto, CA 94304-1194

16 Matthew C. Gaudet (*Pro Hac Vice*)
17 Email: mcgaudet@duanemorris.com
18 John R. Gibson (*Pro Hac Vice*)
19 Email: jrgibson@duanemorris.com
20 Robin L. McGrath (*Pro Hac Vice*)
21 Email: rlmgrath@duanemorris.com
22 David C. Dotson (*Pro Hac Vice*)
23 Email: dcdotson@duanemorris.com
24 Jennifer H. Forte (*Pro Hac Vice*)
25 Email: jhforte@duanemorris.com
26 1075 Peachtree Street, Ste. 2000
27 Atlanta, GA 30309

28 Joseph A. Powers (*Pro Hac Vice*)
29 Email: japowers@duanemorris.com
30 Jarrad M. Gunther (*Pro Hac Vice*)
31 Email: jmgunther@duanemorris.com
32 30 South 17th Street
33 Philadelphia, PA 19103

34 *Attorneys for Defendant*
35 SONICWALL INC.

1 **CERTIFICATE OF SERVICE**

2 This is to certify that a true and correct copy of **SONICWALL INC.'S RESPONSE TO**
3 **FINJAN'S MOTION IN LIMINE NO. 4 TO PRECLUDE EVIDENCE OR TESTIMONY**
4 **REGARDING MR. TOUBOUL'S REPLACEMENT AS CEO OF FINJAN** was served by ECF
5 on all counsel of record on March 11, 2021.

6 */s/ Nicole E. Grigg*
7 Nicole E. Grigg

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